A

HALIM SAAD v. CHAN YOK PENG

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
S NANTHA BALAN JCA
CHE RUZIMA GHAZALI JCA
B [CIVIL APPEAL NO: W-02(IM)(NCVC)-2277-12-2019]
18 SEPTEMBER 2020

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Whether judgment/order obtained on merits – Whether application to set aside judgment/order*
C *fundamentally flawed – Rules of Court 2012, O. 42 r. 13 – Whether applicable – Whether avenue for unsuccessful party to seek review of adverse decision – Whether High Court functus officio – Whether matter barred by res judicata – Whether appeal devoid of merits*

D This was an appeal by the appellant ('defendant') against the decision of the Judicial Commissioner ('JC') dismissing the defendant's application (encl. 40) to set aside the judgment/order of the High Court given under O. 14 of the Rules of Court 2012 ('ROC') whereby judgment was entered against the defendant. The claim of the respondent ('plaintiff') against the defendant was for the recovery of a sum of RM2,500,000 being the balance
E of a friendly loan which was given by the plaintiff to the defendant. According to the plaintiff, the defendant was in need of funds and pursuant to the defendant's request, he gave a friendly loan of RM3,000,000 on 13 November 2014, which was acknowledged by the defendant in an acknowledgment note. The defendant had since repaid a sum of RM500,000
F *via* CIMB Bank Bhd Cheque issued by Cekal Teguh Sdn Bhd ('Cekal Teguh'), which was the defendant's company, and as such the balance sum payable was RM2,500,000. The balance of the loan *ie* RM2,500,000 remained unpaid. The plaintiff sent several letters to the defendant asking for him to settle the loan, but there were no responses. The plaintiff applied for
G summary judgment (encl. 11). A day before judgment was delivered in respect of encl. 11, the defendant filed an application (encl. 25) to amend the defence, in which the defendant appeared to have changed his stance and asserted that if at all there was a loan, then it was a loan between Tekad Mulia Sdn Bhd and Cekal Teguh, and that he was not the borrower. On
H 12 July 2019, the High Court granted order in terms of encl. 11 and as such, encl. 25 appeared to have been abandoned. Subsequently, the defendant applied *via* encl. 40 to set aside the summary judgment/order premised on O. 42 r. 13 of the ROC. Essentially, *via* encl. 40, the defendant was attempting to move the High Court under O. 42 r. 13 of the ROC to set aside the judgment/order on the basis that the judgment/order was a nullity, that
I the judgment/order was procured through concealment of facts by the plaintiff, that there were elements of equitable fraud, that the plaintiff had no cause of action and that the plaintiff lacked the requisite *locus standi.* The JC dismissed the defendant's application. Hence, this appeal.

Held (dismissing appeal with costs)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) Order 42 r. 13 of the ROC is only applicable in respect to the provisions under the ROC which specifically provides for a setting aside or varying any order or judgment in a situation provided under O. 13 r. 8 of the ROC (setting aside judgment in default of appearance to a writ). The judgment/order dated 12 July 2019 was not a default or a consent judgment but rather it was an order/judgment that was obtained on merits after the court had considered all the cause papers. Thus, the defendant's application to set aside the judgment/order dated 12 July 2019 pursuant to O. 42 r. 13 of the ROC was fundamentally flawed. Order 42 r. 13 does not apply to an *inter partes* order which is made pursuant to an application which had been heard on merits. Order 42 r. 13 is not an avenue for an unsuccessful party to seek a 'review' of the adverse decision. Having made the judgment/order on 12 July 2019, the High Court was *functus officio* and had no jurisdiction to consider encl. 40. The matter was, in fact, barred by *res judicata*. (paras 29, 32, 36 & 50)

(2) The defendant had admitted *via* his defence dated 12 March 2019 and in his affidavit affirmed on 23 May 2019 in opposition to the summary judgment application, that he had indeed borrowed RM3,000,000 from the plaintiff and that the loan had been fully paid by way of cash and transfer of shares in a public listed company. Thus, the defendant's suggestion that the borrower was Cekal Teguh and the lender was Tekad Mulia was inherently improbable, was an afterthought and was in stark contrast to the contemporaneous documents and contradicted the defendant's earlier stance per his defence and affidavit. The defendant's failure to respond to the plaintiff's letter and the solicitor's letter of demand sealed the fate of the defendant as the non-response was deemed an admission. This appeal was therefore devoid of merits. (paras 51 & 52)

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Mohd Zin Omar & Anor v. Jentayu Padu Sdn Bhd [2017] 1 LNS 403 CA ***(refd)***
Tan Cheng Hock v. Chan Thean Soo & Anor [1986] 1 LNS 42 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 13 r. 8, O. 14 r. 11, O. 42 r. 13, O. 45 r. 9, O. 47 r. 1, O. 70 rr. 18(6), 20(9), O. 81 rr. 1, 7

For the appellant - Khalid Yusoff & Mohd Faiz Iskandar; M/s Arief & Iskandar
For the respondent - Muhammad Syafiq Amani Md Sabri; M/s Mahadi Redzuan & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22NCVC-40-1-2019 (affirmed).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This is an appeal by the appellant ("defendant") against the decision B of the learned Judicial Commissioner of the High Court dated 3 December 2019 ("the JC") dismissing the defendant's application (encl. 40) to set aside the judgment/order of the High Court dated 12 July 2019 given under O. 14 of the Rules of Court 2012 ("ROC") whereby judgment was entered against the defendant. The defendant's application (encl. 40) is predicated on O. 42 C r. 13, O. 45 r. 9 and O. 47 r. 1 of the ROC. But the specific provision on setting aside of judgments and orders is O. 42 r. 13 of the ROC. For brevity and convenience, we shall refer to the parties by their titles in the High Court ie, as "plaintiff" and "defendant" respectively. On 18 September 2020, we dismissed the defendant's appeal. These are the reasons for our decision.

D

Background

[2] The plaintiff and defendant are well known to each other and have had previous business dealings with each other. The plaintiff's claim against the defendant for recovery of a sum of RM2,500,00 being the balance of a friendly loan which was given by the plaintiff to the defendant. According E to the plaintiff, the defendant was in need of funds and pursuant to the defendant's request, he gave a friendly loan of RM3,000,000.

[3] The loan is said to have been given on 13 November 2014. The defendant had since repaid a sum of RM500,000 *via* CIMB Bank Bhd Cheque F No. 586536 dated 6 March 2015 issued by Cekal Teguh Sdn Bhd ("Cekal Teguh"). As such, the balance sum payable under the friendly loan was RM2,500,00.

[4] It is relevant to mention at the outset that Cekal Teguh is essentially the defendant's own company. The issued share capital of Cekal Teguh is G 100,000 ordinary shares and the defendant is the registered shareholder of 99,997 of the issued share capital of Cekal Teguh. Thus, it is fair to say that the defendant owns and controls Cekal Teguh.

[5] According to the plaintiff, the friendly loan is acknowledged by the defendant in an acknowledgment note dated 13 November 2014.

H

I

Re: Friendly Loan

This is to confirm that I, received a total cash of Ringgit Three Million Only (RM3,000,000.00) from Mr Chan Yok Peng (I/C No. 520810-02-5429) on 13th November 2014

Name: Tan Sri Halim Saad

[6] The balance of the loan ie, RM2,500,00 remained unpaid. The plaintiff sent a letter dated 19 October 2018 and asked the defendant to settle the loan.

[7] The plaintiff's letter to the defendant reads as:

Our Ref: CYP-001-2018
Date: 19th October 2018 (*sic*)

Yang Bahagia Tan Sri Halim Saad,
43-11 The Boulevard, Mid Valley City,
Lingkaran Syed Putra, Kuala Lumpur

Dear Sir,

Re: Outstanding Amount Of RM2,500,000.00 For A Friendly/Personal Loan For The Sum Of RM3,000,000.00

I am writing in reference to a friend/personal loan which had been given to yourself in cash amounting to RM3,000,000.00 on 13.11.2014 which you had duly acknowledged.

I enclosed herewith a copy of the said acknowledgement receipt for your reference of the same.

Please take note that you had only repaid the loan *via* a cheque issued by Cekal Teguh Sdn Bhd on 6.8.2015 for a sum of RM500,000-00 only (see attached). You have still failed and/or refused and/or neglected to pay the balance of RM2,500,000.00.

As such, I hereby demand for the full payment of outstanding amount of RM2,500,000.00 within fourteen days (14) from the date of this letter.

If this matter is not resolved upon the expiry of the fourteen (14) days period, I shall reserve the right to commence legal proceedings to recover all the outstanding amount without further notice to your good self and this letter may be tendered in court as evidence of your failure to pay.

Your prompt response to the above matter is highly appreciated and I am looking forward for your most favourable reply.

Thank you.

Yours sincerely,
(Chan Yok Peng)

CC En Meor Othman bin Meor Lope

[8] There was no response. The plaintiff then instructed his solicitors, Messrs Mahadi Redzuan & Co to send a letter of demand dated 4 December 2018 which reads as:

Our Ref. : M/LM/1959/18/James-Lit

Date : 4th December 2018

Tan Sri Halim bin Saad
(NRIC NO: 531020-09-5135)
43-11 The Boulevard,
Mid Valley City,
Lingkaran Syed Putra,
Kuala Lumpur.

Dear Sir,

Re: Notice Of Demand For Outstanding Payment Of RM2,500,00.00 For A Personal/Friendly Loan Of RM3,000,000

We refer to the above matter wherein we act for Chan Yok Peng (NRIC NO: 520810-02-5429) of No. 10, Jalan Bidai U8/23, Bukit Jelutong, 40150 Shah Alam, Selangor (hereinafter referred to as "our Client").

We are informed by our Client that he had granted a personal/friendly loan to you amounting to RM3,000,000.00 on 13.11.2014 (hereinafter referred to as "the said personal/friendly loan") which is payable on demand. Indeed, you had acknowledged the receipt of the said personal/friendly loan (hereinafter referred to as "the said acknowledgement") full particulars of which shall be within your own knowledge.

We have been instructed by our Client that you had only paid RM500,00.00 to our Client *vide* a CIMB cheque no 586536 dated 6.8.2015 belonging to Cekal Teguh Sdn Bhd a company owns (*sic*) by you and you have still failed and/or refused and/or neglected to pay to our Client a sum of RM2,500,000.00 being the total sum still unpaid and due despite demands from our Client.

We have also been further instructed by our Client that our Client hereby terminates the aforesaid personal/friendly loan and the agreement either verbal or written arising and/or pertaining to the aforesaid personal/friendly loan with immediate effect.

TAKE NOTICE, that we have been instructed by our Client to demand from you to pay to our Client or to us as the solicitors for our Client the said sum of RM2,500,000.00 WITHIN FORTEEN (14) DAYS from the date of this notice hereof together with our legal fees of RM300.00 for the issuance of this notice.

TAKE FURTHER NOTICE, in the event that you failed to pay the aforementioned total outstanding sum/s as hereby demanded within the stipulated period, we are instructed by our Client to proceed with legal action against you for the recovery of all the outstanding sum and all costs incurred therein including costs between solicitors and client basis which shall be borne by you.

Thank you.

Yours faithfully,

(Mahadi bin Muhammad)

c.c. Chan Yok Peng

[9] Again, there was no response. The plaintiff filed the writ on 23 January 2019. Paragraphs 3, 4, and 5 of the statement of claim read as,

3. Pada setiap masa material, Plaintif adalah kenalan kepada Defendan yang kedua-duanya pernah berurusan dalam hal perniagaan. *Atas permintaan Defendan, Plaintif telah bersetuju untuk memberikan pinjaman persahabatan (friendly loan) kepada Defendan wang sebanyak RM3,000,000.00 ("RM 3juta"). Melalui sebuah pengakuan pinjaman persahabatan, Defendan telah menandatangani dan mengesahkan bahawa Defendan telah menerima wang berjumlah RM 3juta tersebut secara tunai daripada Plaintif pada 13.11.2014.*

4. Defendan pada setiap masa material mengetahui bahawa Defendan adalah berhutang dengan Plaintif mengikut perjanjian persahabatan tersebut. Pada 6.8.2015, Defendan telah melalui salah satu syarikatnya bernama Cekal Teguh Sdn Bhd (25445-A) membayar sebahagian daripada jumlah pinjaman persahabatan tersebut kepada Plaintif sebanyak RM500,000.00 melalui cek bernombor CIMB Bank No. 586536 sekaligus meninggalkan baki bayaran tertunggak sebanyak RM2,500,000.00 ("RM 2.5juta").

5. Pada setiap masa material, Plaintif telah berulang kali menghubungi Defendan menuntut Defendan menjelaskan kesemua baki pinjaman persahabatan tersebut namun, Defendan gagal berbuat demikian.

(emphasis added)

[10] The defendant filed his defence on 12 March 2019, and it reads as:

1. Defendan menfailkan dan menyerahkan Pembelaan ini tanpa prejudis kepada haknya untuk menfailkan permohonan untuk membatalkan Writ dan Pernyataan Tuntutan ("Tuntutan") Plaintif dan/atau sebarang permohonan interlokutori relevan lain, yang dirizabkan sepenuhnya.

2. Perenggan 1 *sehingga 3 Tuntutan adalah diakui.*

3. *Perenggan 4 Tuntutan diakui setakat Defendan telah melalui Cekal Teguh Sdn Bhd (25445-A) membayar sebahagian daripada jumlah pinjaman persahabatan tersebut kepada Plaintif.*

A

4. Perenggan 5 Tuntutan adalah dinafikan sekeras-kerasnya. *Defendan seterusnya menegaskan bahawa Defendan telah membuat pembayaran terhadap baki bayaran tersebut secara tunai kepada Plaintif.* Defendan akan mengemukakan keterangan-keterangan mengenai pembayaran tersebut semasa perbicaraan kelak dan/atau bicara permohonan interlokutori, sekiranya ada. Butir-butir pembayaran tersebut juga berada di dalam pengetahuan penuh Plaintif.

B

5. Perenggan 6 Tuntutan berada di luar pengetahuan Defendan.

6. Perenggan 7 Tuntutan adalah dinafikan. Defendan seterusnya menyatakan bahawa Defendan tidak pernah gagal, cuai, enggan dan/atau abai untuk membayar Plaintif baki jumlah pinjaman tersebut. *Sebaliknya, Defendan telah membuat pembayaran sebanyak RM2.5 juta tersebut secara tunai kepada Plaintif dan butir-butir pembayaran tersebut berada di dalam pengetahuan penuh Plaintif.*

C

7. Perenggan 8 Tuntutan adalah dinafikan sekeras-kerasnya.

D

8. Kecuali yang dinyatakan secara nyata, Defendan menafikan setiap dan semua dakwaan-dakwaan di dalam Tuntutan tersebut seolah-olah ia telah dikemukakan dan disangkal secara khususnya. Plaintif diletakkan beban bukti yang kukuh bagi membuktikan Tuntutan beliau.

E

9. Berdasarkan perkara-perkara di atas, Defendan memohon supaya Tuntutan Plaintif ditolak oleh Mahkamah yang Mulia ini dengan kos.

(emphasis added)

[11] The plaintiff filed a reply to defence on 21 March 2019.

F

3. Plaintif menafikan perenggan 4 Pembelaan sekeras-kerasnya dan memplidkan bahawa *selain pembayaran sebanyak RM500,000.00 daripada Cekal Teguh Sdn Bhd (25445-A) melalui cek bernombor CIMB Bank No. 586536 bertarikh 6.8.2015, Plaintif tidak pernah menerima apa-apa bayaran lain terhadap baki pinjaman persahabatan tersebut yang mana masih tertunggak.* Plaintif meletakkan Defendan pada beban bukti yang kukuh.

G

(emphasis added)

[12] On 3 May 2019 the plaintiff applied for summary judgment (encl. 11). The plaintiff's affidavit-in-support (affirmed on 3 May 2019) reads as follows:

H

5. Pada suatu hari, *Defendan memberitahu saya bahawa beliau memerlukan pertolongan. Atas permintaan beliau, sebagai seorang kenalan, saya telah bersetuju untuk memberikan pinjaman persahabatan (friendly loan) kepada Defendan untuk wang sebanyak RM3,000,000.00 ("RM 3juta").*

I

6. Sehubungan dengan itu, Defendan telah menandatangani sebuah pengakuan pinjaman persahabatan yang mana Defendan telah mengesahkan bahawa beliau telah menerima wang berjumlah RM3juta tersebut secara tunai daripada saya pada 13.11.2014.

7. Pada setiap masa material, saya telah berulang kali meminta [*sic*] Defendan membayar balik keseluruhan pinjaman persahabatan tersebut kerana saya memerlukan wang. Berikutan itu, saya kemudiannya telah menerima sekeping cek CIMB Bank Berhad No. 586536 bertarikh 6.8.2015 daripada Cekal Teguh Sdn Bhd (No. Syarikat: 25445-A) untuk jumlah sebanyak RM500,000.00 sebagai sebahagian bayaran (part payment) untuk perjanjian persahabatan tersebut. Untuk makluman Mahkamah yang mulia ini, Cekal Teguh Sdn. Bhd. merupakan salah satu syarikat milik Defendan.

8. Oleh yang demikian, Defendan sememangnya mengetahui dan mengakui pinjaman persahabatan tersebut dan beliau adalah berhutang dengan saya terhadap pinjaman tersebut sekaligus meninggalkan baki bayaran tertunggak sebanyak RM2,500,000.00 ("RM2.5juta) (*sic*).

9. Selepas daripada itu, saya tidak menerima apa-apa bayaran lain terhadap perjanjian persahabatan tersebut. Saya telah berulang kali meminta Defendan membayarnya, namun Defendan enggan, gagal dan/atau cuai untuk membayar baki pinjaman persahabatan tersebut berjumlah RM2.5 juta.

10. Malah, saya juga telah menghantar sepucuk surat tuntutan kepada Defendan bertarikh 19.10.2018 melalui pos berdaftar dan sijil pengakuan pos ke kesemua alamat Defendan yang saya ketahui seperti berikut:

    a) 43-11, The Boulevard,
    Mid Valley City,
    Lingkaran Syed Putra,
    59200 Kuala Lumpur.

    b) 43-2, The Boulevard,
    Mid Valley City,
    Lingkaran Syed Putra,
    59200 Kuala Lumpur.

    c) Level 15-2, Faber Imperial Court,
    Jalan Sultan Ismail,
    50250 Kuala Lumpur.

11. Bukan itu sahaja, saya terus menghubungi Defendan supaya menjelaskan baki bayaran pinjaman persahabatan tersebut. Namun, Defendan tidak mengendahkan tuntutan saya. Oleh yang demikian Defendan telah gagal, cuai, enggan dan/atau abai untuk membayar kepada saya baki jumlah pinjaman persahabatan tersebut sebanyak RM2.5juta yang kini tertunggak, terhutang dan kena dibayar oleh Defendan.

12. Berikutan daripada keingkaran tersebut, saya telah mengarahkan peguamcara cara, Tetuan Mahadi Redzuan & Co menghantar surat tuntutan bertarikh 4.12.2018 kepada Defendan jumlah hutang RM2.5juta yang tertunggak dan sehingga ke hari ini, Defendan masih gagal enggan dan/atau abai untuk membayar baki jumlah hutang sebanyak RM2.5juta tersebut kepada saya.

13. Defendan juga gagal menjawab surat-surat tuntutan tersebut dan Defendan adalah dianggap mengakui tuntutan saya. Seterusnya, adalah dalam pengetahuan saya sendiri bahawa hutang tersebut telah dilakukan dan masih kena dibayar dan terhutang seperti yang telah saya nyatakan.

14. Saya juga ingin menyatakan bahawa Defendan telah memfailkan Pembelaan dan menyatakan bahawa:

a) Defendan mengakui mempunyai pinjaman persahabatan dengan saya untuk jumlah RM3juta tersebut;

b) Defendan mengakui beliau telah mengesahkan dan menandatangani pengakuan bahawa beliau telah menerima RM3juta tersebut daripada saya secara tunai pada 13.11.2014;

c) Defendan mengakui beliau telah membayar RM500,000.00 kepada saya melalui syarikatnya Cekal Teguh Sdn Bhd melalui cek bernombor CIMB Bank No. 586536;

d) Namun, Defendan menyatakan telah membayar baki pinjaman persahabatan berjumlah RM2.5juta tersebut secara tunai.

15. Saya sesungguhnya dinasihati peguamcara saya dan percaya bahawa Defendan tiada isu terhadap pinjaman persahabatan tersebut. Ianya jelas daripada pengakuan-pengakuan dalam Pembelaan Defendan tersebut dan satu-satunya isu yang dibangkitkan Defendan adalah beliau telah membayar baki pinjaman persahabatan tersebut sebanyak RM2.5juta kepada saya secara tunai. Walau bagaimanapun, saya telah memfailkan Jawapan kepada Pembelaan dan memplidkan seperti berikut:

a) selain pembayaran sebanyak RM500,000.00 daripada Cekal Teguh Sdn Bhd (25445-A) melalui cek bernombor CIMB Bank No. 586536 bertarikh 6.8.2015, saya tidak pernah menerima apa-apa bayaran lain terhadap baki pinjaman persahabatan tersebut yang mana masih tertunggak;

b) segala penafian dan pembelaan Defendan adalah penafian kosong semata-mata tanpa sebarang bukti.

16. Saya sesungguhnya dinasihati peguamcara saya dan percaya bahawa isu yang dibangkitkan Defendan tersebut adalah fikir semula (afterthought), remeh temeh, menyusahkan, membuang masa, dan tidak berasas tanpa sebarang bukti. Sepanjang pengetahuan saya, Defendan tidak pernah membuat apa-apa bayaran tunai terhadap baki pinjaman persahabatan tersebut. Malah, Defendan juga gagal memberikan butiran terperinci mengenai bayaran-bayaran tunai yang tersebut (yang saya nafikan) di dalam Pembelaannya.

17. Saya juga dinasihati peguamcara saya dan sesungguhnya percaya bahawa Defendan tiada pembelaan bermerit terhadap tuntutan ini dan tindakan ini adalah jelas dan terang sesuai dibicarakan dibawah Aturan 14 Kaedah-Kaedah Mahkamah 2012. Segala pembelaan

yang difailkan hanyalah pembelaan kosong semata-mata untuk menghalang dan melengahkan prosiding sekaligus adalah suatu penyalahgunaan proses Mahkamah yang mulia ini.

(emphasis added)

[13] The defendant filed an affidavit (affirmed on 23 May 2019) to oppose the plaintiff's application for summary judgment.

[14] The defendant's affidavit reads as:

6. *Perenggan 4 sehingga perenggan 8 Afidavit Sokongan tersebut adalah tidak dipertikai.*

7. Perenggan 9 Afidavit Sokongan tersebut adalah dipertikai. Saya menyatakan bahawa *saya telah membuat pembayaran terhadap baki pinjaman persahabatan berjumlah RM2.5juta kepada Plaintif.*

8. Saya seterusnya menyatakan bahawa *keseluruhan pembayaran baki pinjaman persahabatan sebanyak RM2.5juta tersebut telah dibayar secara tunai dan pemberian saham syarikat tersenarai awam di Bursa Malaysia oleh saya kepada Plaintif. Saya merizabkan hak saya untuk mengemukakan bukti pembayaran saya tersebut [sic] di dalam tindakan ini.*

9. Perenggan 10 Afidavit Sokongan tersebut adalah dipertikai. Saya tidak pernah menerima surat tuntutan tersebut dan tidak ada satu pun surat tuntutan tersebut diakui penerimaannya oleh saya.

10. Perenggan 11 sehingga perenggan 13 Afidavit Sokongan tersebut adalah dipertikai. Saya seterusnya mengulangi perenggan 8 di atas.

11. Menjawab kepada perenggan 14 dan perenggan 15 Afidavit Sokongan tersebut, saya menyatakan bahawa *baki pinjaman persahabatan tersebut telahpun dibayar secara keseluruhan sebanyak RM2.5 juta kepada Plaintif.*

12. Perenggan 16 dan perenggan 17 Afidavit Sokongan tersebut adalah dipertikai. Saya atas nasihat peguamcara saya menyatakan bahawa terdapat isu untuk dibicarakan iaitu sama ada baki pinjaman persahabatan tersebut telah dibayar oleh Defendan kepada Plaintif.

13. Oleh kerana kebanyakan perbincangan (*sic*) di antara Plaintif dan Defendan dilakukan secara lisan, saya menyatakan bahawa isu ini harus dibicarakan di dalam perbicaraan penuh di dalam Mahkamah yang Mulia ini.

(emphasis and underlining added)

[15] On 12 July 2019 judgment under O. 14 of the ROC was entered against the defendant and it reads as:

MAKA ADALAH PADA HARI INI DIPERINTAHKAN bahawa Plaintif dibenarkan untuk memasukkan Penghakiman Terus dan muktamad di bawah Aturan 14 Kaedah 1 Kaedah-Kaedah Mahkamah 2012 terhadap Defendan untuk wang berjumlah sebanyak RM2,500,000.00 (RINGGIT MALAYSIA DUA JUTA DAN LIMA RATUS RIBU) berserta denda

A bayaran terlewat pada kadar 5% setahun terhadap RM2,500,000.00 dari tarikh 19.10.2018 sehingga tarikh penghakiman dan denda bayaran terlewat pada kadar 5% setahun terhadap RM2,500,000.00 dari tarikh penghakiman sehingga tarikh penyelesaian penuh DAN AKHIRNYA DIPERINTAHKAN kos sebanyak RM3,500.00 (RINGGIT MALAYSIA TIGA RIBU LIMA RATUS) sahaja dibayar oleh Defendan kepada B Plaintif tertakluk kepada alokatur.

[16] For reasons which are inexplicable and indeed quite unfathomable, the defendant did not appeal to the Court of Appeal against the decision dated 12 July 2019.

C **[17]** However, it is necessary and relevant to mention that a day before judgment was delivered in respect of encl. 11 ie, on 11 July 2019, the defendant filed an application (encl. 25) to amend the defence. The defendant's affidavit-in-support of his application to amend the defence reads as:

D 3. Saya membuat afidavit dalam menyokong permohonan Defendan untuk kebenaran untuk meminda Pembelaan bertarikh 12.3.2019 ("Permohonan").

4. Lebih kurang akhir bulan Jun 2019, Defendan, sementara menyediakan hujahan bertulis Defendan terhadap permohonan E Plaintif di bawah Aturan 14, Kaedah-Kaedah Mahkamah 2012 telah mendapat tahu maklumat lanjut yang menyokong Pembelaan Defendan terhadap dakwaan Plaintif bahawa Defendan berhutang kepada Plaintif sebanyak RM2,500,000.00.

5. *Berdasarkan dokumen-dokumen yang saya perolehi, jelas menunjukkan bahawa saya tidak berhutang kepada Plaintif. Saya seterusnya menyatakan* F *bahawa sekiranya transaksi pinjaman persahabatan yang dinyatakan oleh Plaintif itu sekalipun wujud, ianya adalah diantara syarikat Tekad Mulia Sdn Bhd ("TMSB") dan Cekal Teguh Sdn Bhd ("CTSB")*.

6. Saya seterusnya menyatakan bahawa bagi menjamin pembayaran CTSB terhadap TMSB tersebut, saya ada memasuki satu perjanjian G bertarikh 9.3.2015 bersama Plaintif berkenaan pembelian 40,000,000 unit saham Sumatec Resources Berhad.

7. Melalui Perjanjian tersebut, Plaintif berakujanji untuk memberi Harga Belian saham kepada saya dan sebarang pembayaran semula Harga Belian saham yang dinyatakan di dalam Perjanjian tersebut H adalah melalui pemberian semula saham dan bukannya pembayaran secara tunai seperti yang dituntut oleh Plaintif di dalam tindakan ini.

8. Secara alternatif, saya menyatakan bahawa terdapat banyak transaksi-transaksi di antara TMSB dan CTSB yang mana TMSB ada memegang saham Sumatec Resources Berhad dan berkemungkinan saham yang dijual oleh Plaintif adalah merupakan I saham CTSB yang dipegang oleh TMSB sebagai pemegang amanah ('held on trust').

9. Ini adalah kerana, merujuk kepada borang pemindahan telegraf bertarikh 17.3.2015 dan 26.3.2015, ia jelas menujukkan [*sic*] bahawa pemindahan wang sebanyak RM4,000,000.00 dan RM1,500,000.00 adalah sebagai penyelesaian pendahuluan atau pinjaman ('settlement of advance/loan').

(emphasis and underlining added)

[18] On 12 July 2019 the High Court granted order in terms of encl. 11. As such, encl. 25 appears to have been abandoned. What is significant about encl. 25 and the defendant's affidavit-in-support thereof is that the defendant appears to have changed his stance and now asserts that if at all there was a loan, then **it was a loan between Tekad Mulia Sdn Bhd and Cekal Teguh Sdn Bhd.** In essence, *via* the proposed amended defence he sought to assert that he was not the borrower. (emphasis added)

[19] In any event, on 12 September 2019 the defendant applied *via* encl. 40 to set aside the summary judgment/order and this is premised on O. 42 r. 13 which reads as follows.

Order 42 r 13

Setting aside or varying judgment and orders

13. Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[20] The defendant's basis for the application (*via* encl. 40) is as stated in the following parts of his affidavit affirmed on 6 September 2019, which read as:

6. Atas nasihat peguamcara saya menyatakan bahawa saya mempunyai alasan bermerit untuk mengetepikan Perintah dan Penghakiman tersebut atas sebab-sebab berikut:

(a) Perintah dan Penghakiman tersebut adalah tidak sah dan terbatal ('nullity');

(b) Perintah dan Penghakiman tersebut diperoleh melalui fakta-fakta yang disembunyikan dan dimanipulasikan ('suppressed and manipulated facts');

(c) Plaintif gagal dan/atau cuai untuk membuat 'full and frank disclosure' di dalam permohonan untuk mendapatkan Perintah dan Penghakiman tersebut; dan

(d) Plaintif tidak mempunyai *locus standi* terhadap saya.

…

8. Di dalam Notis Permohonan (Lampiran 11) tersebut, Yang Arif Puan Rohani Ismail telah membuat dapatan fakta seperti berikut:

A (a) Saya telah membuat pinjaman peribadi sebanyak RM3 juta daripada Plaintif secara tunai pada 13.11.2014 yang mana saya telah mengakui penerimaan jumlah tersebut;

(b) Daripada jumlah RM3 juta tersebut, RM500,000.00 telah dikembalikan oleh saya kepada Plaintif melalui syarikat Cekal Teguh Sdn Bhd ("CTSB");

B

(c) Baki RM2.5 juta masih terhutang oleh saya kepada Plaintif.

9. Hakikatnya, setelah meneliti dokumen-dokumen yang baru diperolehi dari Plaintif dan setelah mendapat penjelasan daripada pekerja-pekerja termasuk yang telah berhenti kerja, saya mendapati C butiran-butiran seperti berikut:

(a) Melalui suratcara yang dikeluarkan dan ditandatangani oleh Plaintif yang juga merupakan Pengarah Urusan Tekad Mulia Sdn Bhd ("TMSB") kepada Markmore Sdn Bhd ("MSB") bertarikh 4.3.2016, suratcara tersebut menyatakan secara spesifik di perenggan 2 seperti berikut:

D

> Tekad Mulia had also loan to Ybhg Tan Sri RM3,000,000.00 (hereafter referred to as "personal loan") on 13th March 2014 (see attached) and was partially paid RM500,000.00 on 6th August 2015.

E (b) Suratcara bertarikh 4.3.2016 telah mengakui bahawa Defendan adalah bukan peminjam dalam prosiding ini. Perakuan bertulis dari Plaintif dibuat dalam perenggan (c) di bawah ini.

(c) Seterusnya, Plaintif juga di perenggan 3 suratcara tersebut menyatakan bahawa:

F

> At the request Ybhg Tan Sri, we Tekad Mulia, had loaned RM8,000,000.00 (hereinafter referred to as "friendly loan") to Cekal Teguh Sdn Bhd as follows:-
>
> (1) RM4,000,000.00 (paid on 17th March 2015)
>
> (2) RM1,500,000.00 (paid on 26th March 2015)

G

> (3) RM2,500,000.00 (personal loan paid on 13th March 2014)
>
> ---
> RM8,000,000.00
> ---

H 10. Merujuk kepada pernyataan-pernyataan Plaintif di dalam surat tersebut, pinjaman-pinjaman tersebut merujuk kepada pinjaman persahabatan antara Plaintif dan Defendan yang dinyatakan di dalam tuntutan Plaintif terhadap saya di dalam Notis Permohonan Lampiran 11 beliau.

I 11. Namun, jelas di dalam surat oleh TMSB tersebut bahawa Plaintif mengakui secara langsung dan bertulis bahawa CTSB sebenarnya peminjam tersebut dan pinjaman tersebut bukan kepada saya, Defendan dalam prosiding ini.

12. Oleh yang demikian, saya atas nasihat peguamcara saya menyatakan bahawa tuntutan yang dibuat oleh Plaintif terhadap saya selaku Defendan adalah satu tindakan salah letak ('misplaced') dan tiada "*locus standi*".

13. Ini adalah kerana, sebarang keberhutangan (sekiranya ada) adalah di antara TMSB dan saya mahupun di antara TMSB dan CTSB.

14. Saya seterusnya menyatakan bahawa penerimaan wang berjumlah RM3 juta tersebut diterima bagi pihak CTSB.

15. Sehubungan dengan itu dan/atau dalam alternative, saya atas nasihat peguamcara saya menyatakan bahawa Plaintif telah bertindak dengan tidak bertanggungjawab untuk melakukan penipuan ekuiti ('equitable fraud') terhadap saya dengan melakukan penyembunyian fakta ('suppression of facts') dan memanipulasikan fakta ('manipulation of facts') terhadap gambaran sebenar mengenai keberhutangan CTSB kepada TMSB.

16. Saya seterusnya menyatakan bahawa Plaintif tidak mempunyai sebarang priviti kontrak terhadap saya dan oleh yang demikian, Plaintif tidak mempunyai sebarang kausa tindakan terhadap saya. Ini adalah kerana sebarang priviti kontrak mengenai pinjaman persahabatan tersebut adalah di antara TMSB dan CTSB.

17. Sehubungan dengan itu, saya atas nasihat peguamcara saya menegaskan bahawa Plaintif tidak mempunyai *locus standi* untuk membawa tindakan ini ke Mahkamah yang Mulia ini. Peguamcara saya akan mengemukakan hujahan undang-undang pada pendengaran permohonan ini kelak.

18. Melalui surat TMSB tersebut juga, Plaintif menyatakan bahawa terdapat satu Perjanjian Pinjaman Persahabatan bertarikh 9.3.2015 di antara Plaintif dan Defendan yang merujuk kepada pembayaran-pembayaran seperti di perenggan 9(c) di atas.

19. Melalui Perjanjian Pinjaman Persahabatan tersebut, sebarang pembayaran semula pinjaman tersebut oleh saya hanya perlu dibayar dalam bentuk pemberian saham. Klausa 5.1 Perjanjian tersebut jelas menyatakan seperti berikut:

    5.1 TSH agrees that he will within seven (7) days of JC's written request made after the Completion Date, return or give back the Sale Shares together with all rights and benefits that attach or accrue to it to JC […].

20. Berdasarkan Perjanjian tersebut, jelas menunjukkan bahawa saya tidak terikat dengan pembayaran semula Harga Belian tersebut dalam bentuk bayaran tunai seperti yang dipohon oleh Plaintif di dalam tuntutan beliau ke atas saya tersebut.

21. Saya seterusnya menyatakan bahawa segala pengakuan saya terhadap sebarang liabiliti di dalam Pembelaan bertarikh 12.3.2019 dan juga di dalam Afidavit Jawapan saya yang diikrarkan pada 23.5.2019 adalah merupakan satu kesilapan yang tidak disengajakan.

A Ini adalah kerana Plaintif dan saya mempunyai banyak transaksi perniagaan sejak perkenalan saya dan Plaintif. Hanya setelah meneliti dokumen-dokumen yang saya baru perolehi dan setelah mendapatkan penjelasan daripada pekerja-pekerja dan bekas pekerja-pekerja barulah saya mendapat butiran jelas dan lengkap mengenai tuntutan Plaintif terhadap saya.

B

22. Oleh yang demikian, saya percaya bahawa saya ada pembelaan bermerit untuk menyokong permohonan saya untuk mengetepikan Perintah dan Penghakiman bertarikh 12.7.2019 tersebut.

[21] The letter that the defendant relies upon to move the court under encl. 40 is a letter by Tekad Mulia Sdn Bhd ("Tekad Mulia") which reads as:

C

Ref: Dir-Let-16-001 Date: 04 March 2016

Markmore Sdn Bhd
43-11, The Boulevard
D Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur

Attention: YBhg Tan Sri Halim Saad

YBhg Tan Sri Halim

E

Re: Sale Of Sumatec Shares

As you are aware, Tekad Mulia Sdn Bhd had on March 18, 2015 sold 40 Million Sumatec Resources Shares (hereafter referred to as the "sale shares") to Maybank Nominees (Tempatan) Sdn Bhd for Markmore Sdn Bhd @ RM0.0205/share. The total amount for the sale is RM8,186,500.00 (see attached).

F

Tekad Mulia had also loaned to YBhg Tan Sri RM3,000,000.00 (hereafter referred to as "personal loan") on 13th March 2014 (see attached) and was partially paid RM500,000.00 on 6th August 2015.

G At the request of YBhg Tan Sri, we, Tekad Mulia, had loaned RM8,000,000.00 (hereafter referred to as "friendly loan") to Cekal Teguh Sdn Bhd as follows:

(1) RM4,000,000.00 (paid on 17th March 2015)

(2) RM1,500,000.00 (paid on 26th March 2015)

H

(3) RM2,500,000.00 (personal loan paid on 13th March 2014)

RM8,000,000.00

As per the Friendly Loan Agreement dated 9th March 2015, YBhg Tan Sri has to pay 15% profit margin based on the friendly loan amount.

I 15% x RM8,000,000.00 = RM1,200,000.00

We hereby submit a written request to Markmore Sdn Bhd to return the sale shares together with the profit margin to Tekad Mulia within 7 days from the date of this letter as per Clause 5.1 (undertaking by TSH) of the Agreement signed on 9th March 2015.

RM 1,200,000.00

Less RM 186,500.00 (Difference between the sale share price and loan amount)

RM1,013,500.00

Your prompt attention to the above matter will be greatly appreciated and we look forward to an amicable settlement.

Thank you.

Yours sincerely,

James Chan
Managing Director
Tekad Mulia Sdn Bhd

cc: Encik Meor Othman, Cekal Teguh Sdn Bhd

[22] In opposing encl. 40, the plaintiff affirmed an affidavit on 14 October 2019 the relevant parts of which read as:

7. I strictly deny and dispute the paragraph 6 of the Affidavit in Support and its sub-paragraph thereof. I have been advised by my solicitors and verily believe that this Defendant's application under Order 42 Rule 13, Order 45 Rule 9 and Oder 47 Rule 1 is defective and against the rules and procedures of the Court. This application is tantamount to a clear abuse of process of the Court. My Solicitors will submit further during hearing of this application.

…

9. I do not dispute paragraph 7 of the Affidavit in Support. I was advised by my solicitor and verily believed that there was no issue of nullity, suppression and manipulation of facts, and full and frank disclosure, as the Defendant had exercised his right to be heard in the proceeding and had exhausted all avenues thereof through the filing of cause papers. Therefore, the Defendant's application is caught by *res judicata* and estopped from raising any new and/or fresh issues after the fall of the hammer.

10. I refer to paragraph 8 of the Affidavit in Support and have no knowledge of the content thereof. I request the Defendant to provide full particulars thereof. As at to date, my solicitors and I have not received any ground of judgment in respect of Encl 11.

11. I deny paragraphs 8-22 of the Defendant's Affidavit in Support and reiterate my depositions as in paragraphs 7-9 above as my reply hereof. My solicitors will submit on the issue of law during the hearing of this application. I wish to state further that pursuant to the letter dated 4.3.2016 at Exhibit HS-3 page 64 of the Defendant's

A Affidavit in Support, it is crystal clear that the sum of RM3,000,000.00 which had been paid RM500,000.00 and leaving balance of RM2,500,000.00 is a "personal loan" which I had loaned to the Defendant personally. The Defendant had admitted that it is a personal loan to him by his conduct to make part payment of RM500,000.00 directly to me (page 39 Defendant's Affidavit in
B Support) in accordance to the Acknowledgement of Personal loan duly executed by him (page 37 Defendant's Affidavit in Support)

12. Nevertheless, I wish to state that the Defendant had an ample time to prepare for his case since my letter of demand dated 19.10.2018 (page 48 Defendant's Affidavit in Support) until the date of filing
C the Defendant's Affidavit in Reply for Encl 11 on 23.5.2019 (page 53-55 Defendant's Afffidavit in Support.

13. I am further advised by my solicitor and verily believed that should the Defendant is not satisfied by the decision before this Honourable Court, an appeal to the Court of Appeal is the quorum
D for the Defendant. This Defendant's application to this Honourable Court to set aside its own decision arrived upon merit, if allowed, would create a mockery in the judicial system whereby this Honourable Court has became *functus officio* upon deciding Encl 11. My solicitors will submit further on this issue during hearing of this application.

E **[23]** The defendant then filed an affidavit (affirmed on 17 October 2019) in response where he said:

4. Menjawab kepada perenggan 11, saya menyatakan bahawa di dalam surat bertarikh 4.3.2016 tersebut jelas menyatakan bahawa peminjam yang sebenar adalah Tekad Mulia Sdn Bhd dan bukannya Plaintif.
F

Oleh yang demikian, pinjaman peribadi seperti yang didakwa oleh Plaintif adalah di antara Tekad Mulia Sdn Bhd dan Cekal Teguh Sdn Bhd dan bukannya di antara Plaintif dan saya.

5. Saya seterusnya menyatakan bahawa bayaran RM500,000.00 tersebut dibuat oleh Cekal Teguh Sdn Bhd dan bukannya saya. Ia
G jelas menunjukkan bahawa Cekal Teguh Sdn Bhd merupakan peminjam sebenar dan bukannya saya.

6. Di dalam Surat Pengakuan Pinjaman Peribadi yang didakwa oleh Plaintif (yang mana dinafikan saya), saya menyatakan bahawa surat pengakuan tersebut hanyalah pengakuan bahawa saya ada
H menerima wang tersebut. Namun, penerimaan wang tersebut adalah bagi pihak Cekal Teguh Sdn Bhd dan bukannya atas kapasiti peribadi.

7. Oleh yang demikian, pihak yang sepatutnya membayar balik pinjaman tersebut, sekiranya ada, adalah Cekal Teguh Sdn Bhd dan
I bukannya saya, Plantif di dalam tindakan ini juga gagal dan/atau cuai untuk mengambil tindakan terhadap Cekal Teguh Sdn Bhd berkenaan pinjaman peribadi tersebut.

8. Oleh yang demikian, atas nasihat peguamcara saya, saya percaya bahawa tiada priviti kontrak di antara Plaintif dan saya dan seterusnya Plaintif tidak mempunyai sebarang *locus standi* dan kausa tindakan terhadap saya. Peguamcara saya akan mengemukakan hujahan undang-undang di dalam hujahan permohonan ini kelak.

9. Saya seterusnya menyatakan bahawa Plaintif telah gagal dalam memberikan gambaran sebenar mengenai penghutang dan pemiutang yang sebenar dan seterusnya Plaintif telah bertindak dengan tidak bertanggungjawab untuk melakukan penipuan ekuiti ('equitable fraud') terhadap saya dengan melakukan penyembunyian fakta ('suppression of facts') dan memanipulasikan fakta ('manipulation of facts') dan tindakan ini.

10. Berikutan isu penipuan ekuiti dan seterusnya isu ketiadaan priviti kontrak di antara Plaintif dan saya yang menjurus kepada ketiadaan *locus standi* dan kausa tindakan terhadap saya, saya atas nasihat peguamcara saya percaya bahawa Perintah dan Penghakiman yang dikeluarkan oleh Mahkamah yang Mulia ini adalah tidak sah dan terbatal ('nullity') dan boleh diketepikan *ex debito justitiae*.

11. Bagi menjawab perenggan 12 Afidavit Jawapan Plaintif, saya menyatakan bahawa surat bertarikh 4.3.2016 tersebut baru diperolehi dan setelah mendapatkan penjelasan daripada pekerja-pekerja dan bekas pekerja-pekerja saya, barulah saya mendapat butiran lengkap mengenai tuntutan Plaintif terhadap saya.

12. Menjawab kepada perenggan 13 Afidavit Jawapan Plaintif, saya atas nasihat peguamcara saya percaya bahawa Mahkamah yang Mulia ini mempunyai bidangkuasa untuk mengetepikan Perintah dan Penghakiman yang bersifat tidak sah dan terbatal ('nullity') kerana terdapat unsur penipuan ekuiti dan seterusnya prinsip '*functus officio*' dan '*res judicata*' seperti yang dibangkitkan oleh Plaintif adalah tidak terpakai di dalam keadaan ini. Peguamcara saya akan mengemukakan hujahan undang-undang di dalam hujahan permohonan ini kelak.

[24] Essentially, *via* encl. 40, the defendant was attempting to move the High Court under O. 42 r. 13 of the ROC to set aside the judgment/order dated 12 July 2019 on the basis that the judgment/order was a nullity, that the judgment/order was procured through concealment of facts by the plaintiff, that there were elements of equitable fraud, the plaintiff has no cause of action, the plaintif lacks the requisite *locus standi* and finally, that the defendant has discovered details of the transactions which were alluded to by the plaintiff in the peladings and affidavits and which apparently gave a clear picture of the true nature of these transactions.

[25] On 3 December 2019, the JC dismissed the defendant's application.

[26] The present appeal is directed at the JC's said decision.

A **Our Findings**

[27] We shall start with the JC's grounds of judgment.

[28] In her grounds of judgment, the JC said (at para. 9), that the defendant's reliance on O. 42 r. 13 of the ROC is flawed.

B **[29]** According to the JC, O. 42 r. 13 of the ROC is only applicable in respect to the provisions under the ROC which specifically provide for a setting aside or varying any order or judgment in a situation provided under O. 13 r. 8 of the ROC (setting aside judgment in default of appearance to a writ), O. 14 r. 11 of the ROC (setting aside judgment against a defendant who C does not appear at the hearing of a summary judgment application), O. 70 r. 18(6), r. 20(9) (setting aside judgment for failure to lodge a preliminary act in an admiralty proceeding), O. 81 r. 7 of the ROC (setting aside judgment against a defendant who does not appear at the hearing of an application under O. 81 r. 1 of the ROC).

D **[30]** The JC also ruled (paras. 10 and 11 of the judgment) that O. 45 r. 9 and O. 47 r. 1 of the ROC are not relevant in so far as encl. 40 seeks to set aside the judgment/order dated 12 July 2019.

[31] The JC also opined (para. 12 of the judgment) that the defendant should have lodged an appeal against the judgment/order dated 12 July 2019. E She concluded that encl. 40 was an "abuse of process".

[32] Next, the JC was of the view (para. 15 of the judgment) that the judgment/order dated 12 July 2019 was not a default or consent judgment but rather it was an order/judgment that was obtained on merits after the F court had considered all the cause papers. Thus, the High Court was *functus officio* and had no jurisdiction to set aside the judgment/order, except under the narrow exceptions posited by the Federal Court in the seminal case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, [1998] 1 MLJ 393, [1998] 1 AMR 909 FC.

G **[33]** On the issue of suppression of evidence and manipulation of facts and equitable fraud, the JC opined that both parties were represented by counsel and they had every opportunity of placing all the relevant materials before the court. As such, the JC held that the jurisdiction to set aside a judgment/ order on the grounds that it is a nullity only arises where it is made in conflict H of written law or in excess of jurisdiction.

[34] The JC noted (paras. 16 and 17 of the judgment) that in encl. 40 the defendant did not assert that that the judgment/order is in breach of written law such as to render it a nullity. The JC found (para. 19 of the judgment) that in light of the defendant's earlier stance per his defence and affidavit-in- I opposition to the plaintiff's summary judgment application, ie, that he borrowed RM3,000,000 from the plaintiff and had paid the loan back in full, the subsequent allegations raised in support of encl. 40 are an "afterthought" and the defendant has not come to court with "clean hands".

[35] The JC also concluded that since the judgment/order was heard on merits, the matter is barred by *res judicata*. A

[36] At the outset, we are compelled to state that the JC's interpretation as to the purpose, scope and ambit of O. 42 r. 13 of the ROC is correct and the law in this regard has been accurately and lucidly stated. We are likewise of the view that the defendant's application to set aside the judgment/order dated 12 July 2019 pursuant to O. 42 r. 13 of the ROC is fundamentally flawed. We do not think that O. 42 r. 13 of the ROC applies to an *inter partes* order which is made pursuant to an application which had been heard on merits. Order 42 r. 13 of the ROC is not an avenue for an unsuccessful party to seek a "review" of the adverse decision. B C

[37] Indeed, the proper route would have been for the defendant to appeal to the Court of Appeal against the summary judgment order dated 12 July 2019. And if the so-called fresh information or documents were discovered or unearthed belatedly, and if they are credible, critical, relevant and persuasive to the issue at hand, then the defendant could have applied to the Court of Appeal and adduced them as "fresh evidence" in the very appeal itself. D

[38] It is important to note that on 11 July 2019 ie, a day before the JC's decision was delivered, the defendant filed an application (encl. 25) to amend the defence to raise the very matters which were eventually relied upon in encl. 40 which was only filed on 12 September 2019. E

[39] It is obvious enough that by 11 July 2019 the defendant was already seized of the so-called information pertaining to the alleged loan between Tekad Mulia and Cekal Teguh. But as it turned out, the defendant waited almost two months before filing encl. 40. The delay is baffling. F

[40] But what is more perplexing is the defendant's averment in his affidavit-in-support of encl. 40 that the loan was between Tekad Mulia and Cekal Teguh. It is clear that in his defence dated 12 March 2019 and in his affidavit-in-opposition to the summary judgment application, the defendant's unequivocal position was that he indeed borrowed from the plaintiff but had repaid the loan in full. G

[41] In fact, he claimed that he had settled the loan by way of payment in cash and by way of transfer of shares in a public listed company. Later, for purposes of encl. 40, the defendant sought to say that he never borrowed at all. He said that it was Cekal Teguh which borrowed RM3,000,000 from Tekad Mulia. H

[42] There is no explanation by the defendant as to why he had previously admitted in his defence and in his affidavit to oppose the summary judgment application, that he had borrowed RM3,000,000 from the plaintiff and that he had fully repaid the loan in cash and by way of shares. I

[43] At any rate, as counsel for the plaintiff had quite rightly submitted, there was evidence of a friendly loan of RM3,000,000 to the plaintiff. In this regard it has to be borne in mind that the defendant is not a simple-minded person or someone who is unfamiliar with commercial matters.

[44] By all accounts, the defendant is a businessman and would have been, or at any rate, ought to have been aware of the implications of affixing his signature to a document such as for example, the acknowledgment note dated 13 November 2014 and the adverse inferences that will be drawn when commercial/legal letters are not responded to.

[45] Here, there is no dispute that the defendant had indeed signed the acknowledgment note on 13 November 2014 and that document captioned as "friendly loan" states unambiguously that the defendant "received a total cash of Ringgit Three Million Only (RM3,000,000) from Mr Chan Yok Peng (I/C No. 520810-02-5429) on 13 November 2014". The defendant states that the acknowledgment merely indicates that he received the loan monies, but the real borrower was in fact Cekal Teguh. However, the fact that Cekal Teguh is the borrower is not mentioned in the acknowledgment note. In fact, a plain reading of the acknowledgment note indicates that it is the defendant who borrowed RM3,000,000 from the plaintiff.

[46] Next, we note that the defendant did not respond to the plaintiff's letter dated 19 October 2018 and to the solicitor's letter of demand dated 4 December 2018. The non-response to the latter documents is fatal to the defendant. Being a person of business, the defendant could not have been unaware of the grave implications to himself by not responding to and repudiating the contents of both the letters.

[47] In this regard, it becomes relevant and necessary to refer to the Court of Appeal's decision in *Mohd Zin Omar & Anor v. Jentayu Padu Sdn Bhd* [2017] 1 LNS 403, [2017] MLJU 407 CA, where Prasad Sandosham Abraham JCA (as he then was) said:

> [10] We had during the course of submissions by the Plaintiff, had our attention drawn to *the Letter of Demand sent by the Plaintiff in this case (see Common Core Bundle pg. 208). There was no response from the Defendants.* In our view that would have presented the Defendants the best opportunity to present the version of the Defendants but it was not done. We refer to the Court of Appeal decision of *Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt* [2016] 9 CLJ pg. 73 where His Lordship Hamid Sultan JCA held:
>
> > (a) In the instant case, *it was not in dispute that the respondent did not respond to the demand notice* of the plaintiff and the defence alleging that he was not liable was only raised in the statement of defence. *Evidently, failing to respond to the plaintiff's letter of demand, that too when the defence case was related to forgery, as well as the fact that the respondent*

did not lodge a police report upon receiving the demand, weakened the probative force of the defence case. In *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155, the Court of Appeal went to the extreme end to say that failure to respond on the facts of the case should lead to entering of judgment. Justice Gopal Sri Ram JCA at page 159 had this to say:

> On December 17, 1991, the respondent wrote to the appellant confirming an agreement between them whereby the former was to receive an additional fee of RM100,000 if he assisted in resolving the problem regarding the access. It is the respondent's case that he did in fact obtain the required access through his exertions. The appellant, however, denies any agreement to pay the additional fee. In respect of this sum, the learned Judge granted leave to defend. We would digress for a moment to say a few words about this latter order of the learned judge.
>
> During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.

(b) In abundance of caution we must say that failure to respond must not be equated to admission of the claim under section 17 of Evidence Act 1950 (EA 1950). Failure to respond will relate to conduct under section 8 of EA 1950. Conduct is a relevant fact for the court to take into account to give the relevant probative force to the version of the plaintiff and/or defendant's case. It is well settled that not all demand notices must be responded. In *Wiedmann v. Walpole* [1891] 2 QB 534, in an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.

(c) It must also be noted that *in commercial cases (not civil), Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.* (See *PECD Construction Sdn Bhd v. Freehold Point Sdn Bhd* [2008] 3 CLJ 215).

(d) There is a latin maxim which says 'silence amount to consent'. (See *Quit tracet consentire videtur*). However, this is not part of our law of evidence. Failure to respond goes to conduct and is a relevant fact and not an admission as stated in illustration (g) of section 8 of EA 1950, which reads as follows:

A (g) The question is whether A owes B RM10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing: "I advise you not to trust A for he owes B RM10,000," and that A went away without making any answer are relevant facts.

B (e) In the instant case, the learned trial judge failed to take into account that the appellant's demand notice in a commercial matter was not responded to. Further there was no reason or justification for not responding to it. The omission of the learned trial judge to do so in our view compromised the decision making process. (emphasis added)

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[48] We also have in mind the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v. Chan Thean Soo & Anor* [1986] 1 LNS 42; [1987] 2 MLJ 479 at p. 487 where he said:

In *Wiedemann v. Walpole* [1891] 2 QB 534 at p 537 an action for breach of
D promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.

Lord Esher MR, in his judgment, remarked, 'Here, we have only to see
E whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise'. Earlier, in his judgment, he said, '*Now there are cases – business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that*
F *he did so agree.* (emphasis added)

[49] Having considered the matter in the round, we are impelled to the view that the JC has not erred in any way in her approach to the issues at hand and in her ultimate decision to dismiss encl. 40. In the present case, the JC had applied her mind to all the relevant facts and circumstances of
G the case. The JC also properly directed herself upon the principles of law that were applicable to the case before her. After weighing all relevant considerations, the JC arrived at her conclusions as per the grounds of judgment. In conclusion, we are of the view that the appellant has failed to demonstrate that the JC made any error of principle when making her
H decision to dismiss encl. 40.

[50] In summary, it is our conclusion that having made the judgment/order on 12 July 2019, the High Court was *functus officio* and had no jurisdiction to consider encl. 40 as it was not predicated on the exceptions which were stated by the Federal Court in *Badiaddin*'s case (*supra*). The matter is in fact
I barred by *res judicata*.

[51] Further, it is clear that the defendant had admitted *via* his defence dated 12 March 2019 and in his affidavit affirmed on 23 May 2019 in opposition to the summary judgment application, that he had indeed borrowed RM3,000,000 from the plaintiff and that the loan had been fully paid by way of cash and tranfer of shares in a public listed company. Thus, the defendant's suggestion that the borrower was Cekal Teguh and lender was Tekad Mulia is inherently improbable, is an afterthought and is in stark contrast to the contemporaneous documents and contradicts the defendant's earlier stance per his defence and affidavit. Lastly, the defendant's failure to respond to the plaintiff's letter and the solicitor's letter of demand seals the fate of the defendant as the non-response is deemed an admission. (see *Mohd Zin Omar*'s case (*supra*) and *Tan Cheng Hock*'s case (*supra*)).

[52] We accordingly find the appeal to be devoid of merits and it is therefore dismissed with costs of RM10,000 (subject to allocator).